Office - Supreme Court, U.S.
FILED
JUL 30 1984
ALEXANDER L. STEVAS,
CLERK

(2)

No. 83-2148

In The

Supreme Court of the United States

October Term, 1983

STATE OF OREGON, DEPARTMENT OF FISH AND WILDLIFE, et al.,
Petitioners,

v.

KLAMATH INDIAN TRIBE,
Respondent.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit

RESPONDENT TRIBE'S BRIEF IN OPPOSITION

DON B. MILLER
Counsel of Record
KIM JEROME GOTTSCHALK
Native American Rights Fund
1506 Broadway
Boulder, CO 80302
(303) 447-8760

SANDE SCHMIDT
Native American Program
Oregon Legal Services Corp.
2328 N.W. Everett
Portland, OR 97210
(503) 223-9483

Counsel for Respondent

July, 1984

COCKLE LAW BRIEF PRINTING CO., (800) 835-7427 Ext. 333

BEST AVAILABLE COPY

QUESTION PRESENTED

Whether a 1901 Cession Agreement between the Klamath Indian Tribe and the United States, which did not mention treaty hunting and fishing rights but provided expressly that treaty rights "not inconsistent with the provisions of this agreement" would be preserved, nonetheless had the effect of extinguishing tribal treaty rights to hunt, fish, trap and gather free of state regulation on the ceded lands.

TABLE OF CONTENTS

	Pages
QUESTION PRESENTED	i
TABLE OF AUTHORITIES	ii
STATEMENT OF THE CASE	1
REASONS FOR DENYING THE WRIT:	
A. The Ninth Circuit's Opinion is Founded Squarely Upon Fundamental Principles of Indian Law	3
B. The Ninth Circuit Did Not Err by Failing to Discuss the "Diminishment" Cases: *Menominee Tribe v. United States*, Which Involves More Difficult Facts, is Controlling	7
C. There is No Conflict in The Circuits	9
CONCLUSION	10

TABLE OF AUTHORITIES

CASES

Antoine v. Washington, 420 U.S. 194 (1975)	3
Bryan v. Itasca County, 426 U.S. 373 (1976)	3
DeCoteau v. District County Court, 420 U.S. 425 (1975)	8
Kimball v. Callahan, 493 F.2d 564 (9th Cir.), *cert. denied*, 419 U.S. 1019 (1974) (Kimball I)	*passim*
Kimball v. Callahan, 590 F.2d 768 (9th Cir.), *cert. denied*, 444 U.S. 826 (1979) (Kimball II)	*passim*
Lac Courte Oreilles Band of Lake Superior Chippewa Indians v. Voigt, 700 F.2d 341 (7th Cir.), *cert. denied*, — U.S. —, 104 S.Ct. 53 (1983)	5, 10
Lower Brule Sioux Tribe v. State of South Dakota, 711 F.2d 809 (8th Cir. 1983), *cert. denied*, — U.S. —, 104 S.Ct. 707 (1984)	5, 6, 9

TABLE OF AUTHORITIES—Continued

	Pages
Mattz v. Arnett, 412 U.S. 481 (1973)	3
Menominee Tribe v. United States, 391 U.S. 404 (1968)	*passim*
Merrion v. Jicarilla Apache Tribe, 455 U.S. 130 (1982)	3
Red Lake Band of Chippewa Indians v. Minnesota (*See* United States v. Minnesota)	9, 10
Santa Clara Pueblo v. Martinez, 436 U.S. 49 (1978)	3
Solem v. Bartlett, — U.S. —, 79 L.Ed.2d 443 (1984)	3
United States v. Minnesota, 466 F. Supp. 1382 (D.C. Minn. 1979), *aff'd sub nom.* Red Lake Band of Chippewa Indians v. Minnesota, 614 F.2d 1161 (8th Cir.), *cert. denied*, 449 U.S. 905 (1980) (Red Lake)	9, 10
United States v. Santa Fe Pacific R. Co., 314 U.S. 339 (1941)	3
Washington v. Fishing Vessel Ass'n., 443 U.S. 658 (1979)	3

TREATIES AND STATUTES

Treaty of October 14, 1864, 16 Stat. 707 (1866)	1, 4
Act of June 21, 1906, 34 Stat. 367 (ratifying Agreement of June 17, 1901)	*passim*
25 U.S.C. § 564 (Klamath Termination Act)	5, 8
25 U.S.C. § 891 *et seq.* (Menominee Termination Act)	4, 5, 8

OTHER AUTHORITIES

F. Cohen, Handbook of Federal Indian Law (1982 ed.)	8

No. 83-2148

In The
Supreme Court of the United States
October Term, 1983

STATE OF OREGON, DEPARTMENT OF FISH AND WILDLIFE, et al.,
Petitioners,

v.

KLAMATH INDIAN TRIBE,
Respondent.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit

RESPONDENT TRIBE'S BRIEF IN OPPOSITION

STATEMENT OF THE CASE

The facts are undisputed. The 1864 Treaty between the United States and the Tribe described a reservation 621,000 acres larger than that subsequently laid out by the government surveyors. After congressional investigation, it was determined that the excluded lands should be ceded by the Tribe to the United States. Neither the resulting 1901 Cession Agreement, nor the 1906 Act of Congress ratifying it, mentioned hunting and fishing rights. Act of June 21, 1906, 34 Stat. 367.

The historical record demonstrates that the excluded lands had initially been included in the reservation at the

Indians' insistence precisely because of their hunting and fishing value to the Tribe. The congressional investigative commission relied heavily on this fact in determining that the lands had indeed been mistakenly excluded from the survey boundaries and that, therefore, they were in fact within the original Treaty Reservation. At the time of the cession the lands were almost completely unsettled, and upon cession were immediately placed in National Parks or Forests and have remained in that status to the present.

The purpose of the Cession Agreement was to honor treaty rights by correcting a government mistake, and the Cession Agreement contains a section specifically preserving consistent treaty rights. The Tribe was not compensated for the taking of its treaty hunting and fishing rights.[1] Tribal members have continued, from aboriginal times through the present, to hunt and fish on the ceded lands without regard to state regulation.

Both courts below found that the 1901 Cession Agreement did not abrogate tribal treaty rights to hunt and fish free of state regulation. They reasoned that, in the absence of a clear indication of congressional intent to extinguish, the tribal rights survive.

---

[1]The Report of the Klamath Boundary Commission itemized the factors on which the appraised per acre value was based. It included soil quality, amount and quality of meadow and grazing lands, and amount and value of timber but made no mention of hunting or fishing rights.

REASONS FOR DENYING THE WRIT

A. The Ninth Circuit's Opinion is Founded Squarely Upon Fundamental Principles of Indian Law.

The opinion below simply applied canons of construction that have been consistently reaffirmed by this Court for more than a century, *i.e.*, important Indian rights may not be extinguished by implication, and ambiguities in statutes ratifying agreements between the United States and Tribes must be resolved in the Indians' favor.[2]

The Ninth Circuit's holding relies primarily on this Court's ruling in *Menominee Tribe v. United States,* 391 U.S. 404 (1968), as well as two earlier Ninth Circuit opinions upholding the Klamath Tribe's rights, under the same 1864 Treaty, to hunt and fish free of state regulation on

---

[2]See, e.g., United States v. Santa Fe Pacific R. Co., 314 U.S. 339, 353 (1941) ("clear and plain" statement of intent required to support asserted taking of aboriginal lands); Antoine v. Washington, 420 U.S. 194, 199-200 (1975) (Ambiguities in act must be resolved in favor of tribe, as they would have understood); Washington v. Fishing Vessel Ass'n., 443 U.S. 658, 690 (1979) ("Absent explicit statutory language, we have been extremely reluctant to find congressional abrogation of treaty rights . . ."); Mattz v. Arnett, 412 U.S. 481, 504-05 (1973) (Congressional intention to terminate reservation status must be expressed on face of act or be clear from surrounding circumstances or legislative history); Bryan v. Itasca County, 426 U.S. 373 (1976) (Express statement by Congress required to affect tribal immunity from state tax jurisdiction); Santa Clara Pueblo v. Martinez, 436 U.S. 49, 59 (1978) (Tribal sovereign immunity from suit unaffected "in the absence . . . of any unequivocal expression of contrary legislative intent"); Merrion v. Jicarilla Apache Tribe, 455 U.S. 130, (1982) (Clear indication of congressional intent required to support an implicit repeal of tribe's taxing power); Solem v. Bartlett, — U.S. —, 79 L.Ed.2d 443 (1984) (Congress must clearly evince intent to change boundaries before diminishment will be found).

a different portion of the same 1864 Treaty Reservation. *Kimball v. Callahan,* 493 F.2d 564 (9th Cir.), *cert. denied,* 419 U.S. 1019 (1974) (*Kimball I*), and *Kimball v. Callahan,* 590 F.2d 768 (9th Cir.), *cert. denied,* 444 U.S. 826 (1979) (*Kimball II*).

In *Menominee Tribe,* this Court held that the 1954 Menominee Termination Act, 25 U.S.C. § 891, *et seq.,* did not extinguish Indian treaty rights to hunt and fish free of state regulation, despite the fact that the Act made no mention of preserving those rights and further provided that "the laws of the several States shall apply to the tribe and its members in the same manner as they apply to other citizens. . . ." 25 U.S.C. § 899. The *Menominee* Court looked to the overall purpose of the Termination Act, *i.e.,* to settle the government's financial obligations to the Tribe, and held that a construction which resulted in extinguishment of a compensable property right would be inconsistent with this overall purpose. 391 U.S. at 413. The Court refused to allow the general application of state law to work a "backhanded" abrogation of specific treaty rights[3] to hunt and fish free of state regulation, evoking the oft-affirmed principle that treaty rights may only be extinguished through a clear and unequivocal statement of congressional intent. 391 U.S. at 412-13.

---

[3]While the Menominee Treaty contained no explicit reservation of hunting and fishing rights, the Court there held that the language confirming the Reservation, "for a home, to be held as Indian lands are held," encompassed the right to hunt and fish. 391 U.S. at 406. The 1864 Klamath Treaty contains express language preserving fishing rights, which the Ninth Circuit in *Kimball I, supra,* held to encompass hunting, gathering, and trapping rights as well.

In *Kimball I* and *II,* the Ninth Circuit applied the *Menominee* holding to the Klamath Tribe and its terminated Reservation, finding that the Klamath treaty rights likewise survived termination of that Reservation and the sale of its lands. Both the Klamath and Menominee Termination Acts had the effect of completely terminating, or disestablishing, the status of the affected lands as Indian reservations.[4] 25 U.S.C. § 564(e), (p), and (q) (Klamath Termination Act); and 25 U.S.C. §§ 897 and 899 (Menominee Termination Act).

Recently, both the Seventh and Eighth Circuit Courts of Appeals have likewise held that treaty hunting and fishing rights survive the disestablishment of reservation boundaries and sale of reservation lands absent clear congressional language of extinguishment. In *Lac Courte Oreilles Band of Lake Superior Chippewa Indians v. Voigt,* 700 F.2d 341 (7th Cir.), *cert. denied,* — U.S. —, 104 S.Ct. 53 (1983), the Seventh Circuit held that tribal

---

[4]In Lower Brule Sioux Tribe v. State of South Dakota, 711 F.2d 809, 815 n.3 (8th Cir. 1983), *cert. denied,* — U.S. —, 104 S.Ct. 707 (1984), the Eighth Circuit discussed the various terms applied by courts to describe the cessation of reservation status:

> For the sake of clarity, we note that the question whether the boundaries of an Indian reservation, as drawn when the reservation was established, are redrawn after part of that reservation has been opened for settlement, has been expressed in several different ways by various courts. The process has been called disestablishment (referring to the disestablishment of the original reservation boundaries); diminishment (referring to a diminishing or shrinking of the original boundaries); termination of reservation status (if the original boundaries are redrawn, the reservation status of the land is no longer within the boundaries and thus is terminated); and a change of boundaries.

treaty rights to hunt, fish, trap and gather free of state regulation on public lands in the northern third of Wisconsin survived an agreement by the Tribe to "cede to the United States all that tract of country." *Id.* at 345. Noting that "treaty-recognized rights of use, or usufructuary rights, do not necessarily require that the tribe have title to the land," *id.* at 352, the Seventh Circuit held: "a termination of treaty-recognized rights by subsequent legislation must be by *explicit* statement or must be *clear* from the surrounding circumstances or legislative history." *Id.* at 354 (citing *Menominee Tribe*, emphasis in original).

In *Lower Brule Sioux Tribe v. State of South Dakota*, 711 F.2d 809 (8th Cir. 1983), *cert. denied* — U.S. —, 104 S.Ct. 707 (1984), the Eighth Circuit considered whether two acts of Congress taking reservation lands for dam and reservoir purposes also resulted in a taking of tribal treaty rights to hunt and fish free of state regulation on the taken lands. Holding that tribal rights survived despite loss of possessory title, the Court found that the rights in issue were not appurtenant to the reservation land itself. The Eighth Circuit likewise relied on the cardinal principles that "in order to abrogate treaty rights and authorize the application of state law . . . Congress must *expressly* do so" and "doubtful expressions of congressional intent must be resolved in favor of the Indians." 711 F.2d at 822 (citing *Menominee Tribe*, emphasis in original).

Thus *Menominee Tribe* and the Seventh, Eighth and Ninth Circuit opinions that have followed it, establish that treaty rights to hunt and fish free of state regulation survive the disestablishment of reservation status, as

well as the loss of tribal title to the land, absent a clear expression of congressional intent to abrogate those rights.

B. The Ninth Circuit Did Not Err by Failing to Discuss the "Diminishment" Cases: Menominee Tribe v. United States, Which Involves More Difficult Facts, is Controlling.

In its Petition, the State of Oregon argues that the Ninth Circuit erred in failing to consider that the 1901 Cession Agreement "diminished the boundaries of the Klamath Indian Reservation." (Petition at 9). In fact, the Ninth Circuit did not discuss "diminishment" law simply because the question of the continuation of tribal hunting and fishing rights had already been resolved by this Court and the Ninth Circuit in the more difficult context of termination legislation. *See Menominee Tribe* and *Kimball I*. Diminishment of a reservation is subsumed within termination of a reservation.[5] Therefore, if tribal

---

[5]This case, like *Menominee Tribe* and *Kimball I*, has proceeded from the day it was filed on the assumption that diminishment did occur as a result of the 1901 cession. In arguing that the *Menominee* analysis does not control here, Oregon fails to understand that the Termination Acts construed in *Kimball I* and *Menominee Tribe* are substantially more far-reaching than the Cession Agreement involved here and this, therefore, is an easier case. The extent of the State's confusion is revealed by its assertions that, after termination: (1) the lands of the Klamath Reservation remained subject to the Indians' right of occupancy (Petition at 9), and (2) the lands involved in *Menominee Tribe* remained within reservation boundaries (Petition at 11).

In fact, of course, just the opposite is true. The impact of the Termination Acts on the status of the Menominee and Klamath Reservations was much more comprehensive than the impact of the 1901 cession at issue here or other cession agree-

(Continued on next page)

hunting and fishing rights survive termination, *a fortiori*, they survive diminishment.

Thus, assuming "diminishment" and applicability of state laws for most purposes, the question resolved in the Indians' favor by the *Menominee* and *Kimball* courts was whether the complete congressional termination of reservation status had resulted in abrogation of the specific, constitutionally protected, treaty right to hunt and fish free of state regulation. In this case, the Ninth Circuit construed a less comprehensive congressional action in light of: (1) an express provision preserving consistent treaty rights, (2) an overall congressional purpose to honor treaty obligations, (3) congressional failure to mention hunting and fishing rights or pay compensation, and (4) the fact that the ceded lands were, for the most part, unsettled forest lands good for little else other than hunting, fishing and trapping. Unremarkably, the Ninth Circuit held that the rights did survive.

(Continued from previous page)

---

ments construed in the "diminishment" cases. *See, e.g.*, DeCoteau v. District County Court, 420 U.S. 425 (1975). While turn-of-the-century cession agreements sometimes diminished reservation boundaries by removing the Indian country status of a portion of a reservation, the termination acts of the 1950's completely eliminated entire Indian reservations and brought to an end most aspects of the federal-tribal relationship. *See generally* F. Cohen, Handbook of Federal Indian Law, 815-16 (1932 ed.). Such was the case at both Klamath and Menominee: the Indian country status of both reservations was ended. The lands of the Klamath Reservation were sold outright. The lands of the Menominee Reservation were transferred to a private corporation chartered under Wisconsin law. Moreover, each Termination Act contained express language making the laws of the state applicable to the Tribe and its members, 25 U.S.C. §§564(q) and 899. In contrast, the 1901 Cession Agreement contained no comparable provision.

C. There is No Conflict in The Circuits.

Oregon further claims that a conflict exists between the Eighth and Ninth Circuits on the issue presented in this case. Relying on a United States District Court opinion that was affirmed in a three paragraph *per curiam* decision of the Eighth Circuit, *United States v. Minnesota*, 466 F.Supp. 1382 (D.C. Minn. 1979), *aff'd sub nom. Red Lake Band of Chippewa Indians v. Minnesota*, 614 F.2d 1161 (8th Cir.), *cert. denied*, 449 U.S. 905 (1980) (*Red Lake*), Oregon argues that the rule in the Eighth Circuit is that where reservation lands are ceded and boundaries diminished, treaty hunting and fishing rights are thereby necessarily abrogated (Petition at 12-14).

However, in the subsequent *Lower Brule* case, *supra*, the Eighth Circuit made it plain, in a comprehensive 16-page opinion, that once diminishment occurs, courts must still engage in a *Menominee Tribe* analysis. The Eighth Circuit, like the Ninth Circuit, squarely recognized that this Court has ruled in *Menominee Tribe* that diminishment does not necessarily result in a loss of treaty rights:

> If either act disestablished the reservation boundaries, the application of state law on the land taken by that Act no longer would be preempted, and South Dakota would have jurisdiction to regulate hunting and fishing by tribal members on that land *absent federal law preserving the Indians' treaty hunting and fishing rights. . . . Menominee Tribe v. United States*, 391 U.S. 404 (1968).

711 F.2d at 815 (emphasis added). Moreover, the *Lower Brule* Court declined to apply the *Red Lake* reasoning that hunting and fishing "rights are mere incidents of Indian title," 466 F.Supp. at 1385. The Eighth Circuit held that such reasoning:

failed to recognize that the Tribe's treaty hunting and fishing rights are severable from their treaty rights to *exclusively* own, occupy and utilize the land granted to them as a reservation.

711 F.2d at 823 (footnote omitted, emphasis in original).[6]

The expansive and well-reasoned opinion of the Eighth Circuit in *Lower Brule* is entirely consistent with *Menominee Tribe* and its Ninth Circuit progeny, *Kimball I, Kimball II* and this case. There is no conflict in the circuits.

CONCLUSION

Menominee Tribe, Kimball I, Kimball II, Lac Courte Oreilles and *Lower Brule* together establish clearly that termination of reservation status and conveyance of reservation lands do not, absent a clear expression of congressional intent to abrogate, result in the loss of treaty rights to hunt and fish free of state regulation. No conflict among the circuits exists. Oregon's Petition should be denied.

[6] *Red Lake* is fundamentally distinguishable from this case on additional, equally important grounds. The right asserted in *Red Lake* was a right appurtenant to the land itself, *i.e.*, a right to enter upon private land to hunt and fish. The lands at issue in *Red Lake* were ceded by the Tribe to the United States pursuant to general authority granted the Secretary of the Interior by the Nelson Act, the purpose of which was "to restore the [Indian reservation] land to the public domain and open it to settlement by whites." 466 F.Supp. at 1387. In contrast, the right asserted here is only the right to hunt and fish free of state regulation: the Tribe asserts no rights against landowners. *Kimball II, supra*, 590 F.2d at 772. Additionally, the land cession at issue here was accomplished under a special act of Congress, the purpose of which was to finally settle a boundary dispute and honor treaty obligations. Opening the lands to settlement was clearly not a purpose of the 1901 cession agreement. Only one percent of the lands had been entered for settlement and virtually all were immediately placed in National Parks or National Forests.

Respectfully submitted,

DON B. MILLER
Counsel of Record

KIM JEROME GOTTSCHALK
Native American Rights Fund
1506 Broadway
Boulder, CO 80302
(303) 447-8760

SANDE SCHMIDT
Native American Program
Oregon Legal Services Corp.
2328 N.W. Everett
Portland, OR 97210
(503) 223-9483
Counsel for Respondent